

SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

STATE *v.* JAN G., SC 19518
Judicial District of New Britain

Criminal; Whether Defendant Compelled to Represent Himself in Testifying in his own Behalf and, if so, Whether he Executed Valid Waiver of his Right to Counsel Before Testifying. The defendant was charged with murder in connection with the death of his father. At trial, the defendant's attorney informed the trial court that the defendant intended to testify in his own defense. After the court canvassed the defendant regarding that decision, the defendant's attorney, citing the Rules of Professional Conduct, sought that the defendant be permitted to testify in a narrative manner rather than in the typical question and answer form. In canvassing the defendant regarding his attorney's request that he be allowed to testify in the narrative form, the court asked the defendant whether he understood that his attorney's request put the attorney in a position where the attorney was "not being effective in representing [the defendant]," and asked the defendant whether he was waiving any claim of ineffective assistance of counsel in connection with the request. The defendant assured the court that he wanted to proceed by testifying in the narrative and that he was waiving any claim of ineffective assistance of counsel. The defendant then testified in the narrative manner about the events leading up to and including the date of the incident. The defendant was convicted of murder, and he appeals, claiming that he is entitled to a new trial because he was compelled to represent himself in order to exercise his right to testify in his own behalf and that he did not knowingly and voluntarily waive his right to counsel before doing so. The defendant contends that he was not represented by counsel when he testified and that the record establishes that he never clearly invoked his right to represent himself or waived his right to counsel before he testified in his own behalf.

DAVID EUBANKS *v.* COMMISSIONER OF CORRECTION, SC 19780
Judicial District of Tolland

Habeas; Whether Trial Counsel Rendered Ineffective Assistance in Failing to Object to Admission of Testimony as Double Hearsay. The petitioner was convicted of possession of a weapon

without a permit in a motor vehicle. He brought this habeas action claiming that his trial counsel rendered ineffective assistance in failing to adequately object to the admission as substantive evidence in his criminal trial of transcript containing testimony by Tanika McCotter. McCotter was unavailable to testify at the petitioner's criminal trial but had testified at a prior hearing that she was driving a vehicle in which the petitioner was a passenger when shots were fired and that she did not know from where the shots originated. McCotter was impeached during her testimony through a prior recorded statement that she had made to the police in which she stated that the petitioner and another passenger were shooting guns from the vehicle that she was driving. The trial court admitted the transcript under the former testimony exception to the hearsay rule. The habeas court found that the petitioner had not proven his ineffective assistance of counsel claim and denied the petition. The Appellate Court (166 Conn. App. 1) reversed, finding that trial counsel's failure to identify, and object to, the portion of McCotter's testimony concerning her prior statement to the police that was used for impeachment purposes at the prior hearing as inadmissible hearsay within hearsay amounted to deficient performance. The Appellate Court noted that trial counsel testified at the habeas hearing that he had sought to preclude the admission of McCotter's testimony at the criminal trial on any grounds available to him and that he did not claim that he chose not to object as part of a trial strategy. The Appellate Court further found that the petitioner was prejudiced by his attorney's deficient performance because there was a reasonable possibility that the outcome of the criminal trial would have been different had the testimony been excluded because there was very little other evidence that the petitioner was in possession of a weapon in the motor vehicle. The Supreme Court granted the commissioner certification to appeal, and it will consider whether the Appellate Court properly reversed the habeas court's judgment for the commissioner on the petitioner's claim that his trial counsel rendered ineffective assistance in failing to object to the admission of portions of McCotter's testimony on the ground that they were double hearsay.

DENIS HICKEY *v.* COMMISSIONER OF CORRECTION, SC 19781
Judicial District of Tolland

**Habeas; Whether Counsel Rendered Ineffective Assistance
in Failing to Seek *DeJesus* Instruction on Uncharged Sexual
Misconduct Evidence; Whether Appellate Court Properly**

Remanded to Habeas Court for New Trial on Issue of Whether Petitioner Prejudiced by Counsel's Deficient Performance. The petitioner was convicted of crimes related to the sexual abuse of a child, and he brought this habeas action alleging that his trial attorney provided ineffective assistance. He argued that his attorney performed deficiently in failing to ask the court for a cautionary jury instruction at the time it admitted evidence of his prior, uncharged sexual misconduct involving another minor, as required by *State v. DeJesus*, 288 Conn. 418 (2008). The habeas court granted the petition, finding that the petitioner's trial attorney rendered ineffective assistance and that the petitioner was prejudiced as a result. The respondent appealed, and the Appellate Court (162 Conn. App. 505) reversed and remanded to the habeas court for a new trial on the petitioner's claim of ineffective assistance of trial counsel. The Appellate Court held that, while the habeas court properly could have concluded that the attorney's conduct at trial was deficient, it improperly concluded that the petitioner was prejudiced as a result. It determined that the habeas court neglected to substantiate its conclusions with a factual analysis of how the lack of a *DeJesus* cautionary instruction misled the jury or resulted in an unfair trial. The Appellate Court faulted the habeas court for failing to assess the risk of undue prejudice posed by the prior misconduct evidence, particularly in light of the medical testimony that substantiated the victim's sexual abuse, and for failing to analyze counsel's deficient performance in the context of the entire trial, including the evidence and arguments of counsel. The Supreme Court granted the respondent's petition for certification to appeal, and it will decide whether the Appellate Court properly determined that trial counsel's conduct was deficient in that it was not sound trial strategy as a matter of law. The Supreme Court may also decide whether the Appellate Court properly remanded the matter for a new habeas trial addressing prejudice rather than engaging in its own plenary review of the prejudice issue.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

STATE *v.* BRIAN JORDAN, SC 19810

Judicial District of New Haven at Meriden at G.A. 7

Criminal; Whether Trial Court Erred in Excluding Evidence of Victim's Domestic Violence Convictions Offered in Support of Claim that Victim the Initial Aggressor; Whether Preclusion

of Initial Aggressor Evidence Harmless Error. The defendant was charged with assault in the second degree with a dangerous weapon after he struck the victim on the side of the head and face with a glass object during a barroom fight. The defendant was convicted following a jury trial, and he appealed, claiming that the trial court abused its discretion in precluding him from introducing evidence of the victim's history of violent behavior in support of his claim that the victim was the initial aggressor and that he had acted in self-defense. The Appellate Court (166 Conn. App. 35) affirmed the defendant's conviction, concluding that, while the trial court wrongly precluded evidence that the victim had been convicted of crimes involving domestic violence, the error was harmless. The Appellate Court determined that evidence of the victim's convictions should have been admitted because it was probative of the defendant's claim that the victim was the initial aggressor and because, even though the victim's convictions occurred subsequent to the barroom incident here, they were similar to the charged offense. The court nonetheless determined that the trial court's error in refusing to admit the evidence was harmless where there was ample evidence before the jury that the defendant was the initial aggressor when he struck the victim. The defendant appeals, and the Supreme Court will decide whether the Appellate Court properly concluded that the trial court abused its discretion in excluding evidence of the victim's subsequent domestic violence convictions and, if so, whether it properly concluded that the preclusion of that evidence constituted harmless error.

STATE *v.* KENNETH PORTER, SC 19818
Judicial District of New Haven

Criminal; Whether Appellate Court, In Determining that Multiple Convictions did not Violate Double Jeopardy, Properly Reviewed Evidence at Trial Rather than Confining its Inquiry to Allegations in Charging Document. The defendant was convicted of assault of public safety personnel and interfering with an officer in connection with an incident in which he struggled with police during a motor vehicle stop. The defendant appealed, claiming that his convictions of both offenses violated double jeopardy because interfering with an officer is a lesser included offense of assault on an officer and because, as charged by the state in the information, both charges stemmed from the same conduct. The Appellate Court (167 Conn. App. 281) rejected that claim and affirmed the defendant's convictions, finding that the two crimes did not stem from the same conduct and

accordingly that there was no double jeopardy violation. The court held that where, as here, the state's charging documents do not separate a transaction into separate parts, a reviewing court has the obligation to determine whether the multiple convictions reasonably could have been predicated on different conduct. On reviewing the evidence presented at trial, the Appellate Court concluded that the jury reasonably could have found that the two crimes did not stem from the same conduct. The court explained that the defendant's conviction of assault of an officer could reasonably have been based on his aggressive conduct in resisting when the officer tried to remove him from his vehicle, whereas his conviction for interfering with an officer could reasonably have been predicated on his separate conduct of removing a bag of marijuana from his pants and putting it in his mouth. The defendant appeals, and the Supreme Court will decide whether, in determining that the defendant's double jeopardy rights had not been violated, the Appellate Court properly reviewed the evidence presented at trial rather than confining its inquiry to the allegations in the state's charging document.

JENNIFER HELMEDACH *v.* COMMISSIONER OF CORRECTION,
SC 19836

Judicial District of Tolland

Habeas; Ineffective Assistance of Counsel; Whether Defense Counsel's Delay in Conveying Plea Offer a Strategic Decision an Attorney is Allowed to Make and, if so, Whether Decision Reasonable Here. The petitioner was sentenced to thirty-five years in prison for felony murder, robbery and conspiracy, and she brought this habeas action claiming that her trial attorney rendered ineffective assistance in failing timely to inform her of the state's plea offer of ten years of incarceration. The state made the offer on the day that the petitioner was expected to testify. Because the petitioner's attorney had spent a great deal of time preparing her to testify and was concerned that the news of the offer would negatively impact her testimony, he asked the state if he could convey the offer after the petitioner testified, and the state agreed. When the petitioner finished testifying and was notified of the offer, she expressed a desire to accept it, but the state had withdrawn the offer. The habeas court found that the attorney rendered ineffective assistance in failing to relay the plea offer in a timely manner and granted the petition. The Appellate Court (168 Conn. App. 439) affirmed, concluding that the attorney's decision to delay conveying the offer fell below an objective

standard of reasonableness required by attorneys under the state and federal constitutions. It determined that the decision was not within the realm of strategic decisions that an attorney is allowed to make, that counsel had a duty to promptly convey the offer and that his failure to do so prevented the petitioner from properly exercising her right to decide whether to plead guilty or testify on her own behalf. The Appellate Court also determined that even if the attorney's decision could be considered a matter of trial strategy, it was not reasonable given that the state had already rescinded a previous plea offer in the case, that the attorney's partner informed him that the decision was not reasonable, and that the attorney had no explanation for how the decision would affect his trial strategy. The respondent appeals, and the Supreme Court will decide whether the Appellate Court properly found that the attorney had no authority to delay in conveying the plea offer and whether, assuming the attorney had the authority to do so as a matter of strategy, the Appellate Court properly concluded that the decision was unreasonable under the circumstances here.

STATE *v.* ROBERT H., SC 19841
Judicial District of Hartford

Criminal; Risk of Injury; Whether Corpus Delicti Rule a Rule of Admissibility that does not Implicate Sufficiency of State's Evidence. The defendant was convicted after a jury trial of two counts of risk of injury to a child arising out of allegations that he masturbated in the presence of the minor victim on two separate occasions. He appealed, claiming that there was insufficient evidence to support his conviction on the second count because the only evidence to support the finding that he masturbated in the presence of the victim on more than one occasion were his oral and written statements to the police, including his confession to the police that he had masturbated in the victim's presence "at least twice." The defendant claimed that the common law corpus delicti rule, or corroboration rule, precluded his confessions from being used as evidence of the second incident because there was no other evidence presented at trial tending to establish that the second incident occurred. The corpus delicti rule prohibits the introduction of an extrajudicial confession in a criminal case unless the prosecution introduces some evidence independent of the confession to establish that the crime described in the confession actually occurred. The Appellate Court (168 Conn. App. 419) affirmed the defendant's conviction, holding that the defendant could not prevail where he did not challenge the

admissibility of his confession under the corpus delecti rule before the trial court and where his unpreserved claim was evidentiary in nature and not of constitutional magnitude. The court emphasized that the corpus delecti rule governs the admissibility of evidence and that application of the rule does not implicate the sufficiency of the state's evidence. The Appellate Court concluded that the defendant's extrajudicial confessions constituted sufficient evidence to sustain his conviction of the second count of risk of injury, noting that the jury was free to credit the testimony concerning the confessions over the testimony of the victim, who testified that she remembered the defendant masturbating in her presence on only one occasion. The defendant appeals, and the Supreme Court will consider whether the Appellate Court properly rejected the defendant's claim that the evidence was insufficient to support his conviction of the second count risk of injury on determining that the corpus delecti rule is merely a rule of admissibility.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

STATE *v.* TERRANCE BROWN, SC 19960
Judicial District of New Haven

Criminal; Whether Trial Court Properly Suppressed Cell Site Location Information Obtained From Cell Phone Provider Pursuant to General Statutes (Rev. to 2011) § 54-47aa. The defendant was suspected in a string of burglaries where thieves used stolen minivans to break in to gas stations and convenience stores and make off with automated teller machines. In 2010, General Statutes § 54-47aa provided that the police could obtain an ex parte court order requiring a telecommunications carrier to disclose a customer's "call-identifying information" on a showing of reasonable and articulable suspicion. Here, the police obtained an order pursuant to § 54-47aa requiring the defendant's cellular provider to disclose cell site location information (CSLI) that allowed the police to determine that the defendant had used his phone in close proximity and location to burglaries involving ATM machines in Shelton, Ansonia and Waterbury. The evidence obtained pursuant to that order led to the defendant's arrest, and he was charged with several counts of burglary and larceny. The defendant moved to suppress the CSLI data and other evidence collected that flowed from the data. The trial court granted the defendant's motion to suppress, ruling that § 54-47aa, in authorizing collection of "call-identifying information" on a showing of reasonable and articu-

lable suspicion, did not authorize the warrantless collection of CSLI data. The court found that neither the words of the statute nor its legislative history revealed any legislative intent to permit the warrantless collection of information that would enable the police to track the physical whereabouts of citizens. The trial court ruled that the data here was illegally obtained because it was obtained without a showing of probable cause and a warrant and ordered that the CSLI data and its tainted fruit be suppressed. The state then entered a nolle prosequi on the criminal charges for want of evidence, and the trial court subsequently granted the defendant's motion that the charges be dismissed. The state appeals, claiming that the trial court improperly concluded that General Statutes (Rev. to 2011) § 54-47aa did not permit the trial court to order that the defendant's CSLI data be disclosed to the police on a showing of reasonable and articulable suspicion. The state also claims that suppression of the evidence was not the appropriate remedy for the purported violations of § 54-47aa and that suppression was inappropriate here where the police acted in "good faith" by reasonably relying on the issuing judge's interpretation of the statute. Finally, the state claims that the trial court wrongly ordered some of the evidence suppressed where that evidence was subject to the inevitable discovery exception to the exclusionary rule.

MASHAWN GREENE v. COMMISSIONER OF CORRECTION, SC 19961
Judicial District of Tolland at Rockville

Habeas; Whether State Improperly Failed to Correct Witness' Testimony Regarding Whether Witness was Given Favorable Treatment in Exchange for his Testimony; Whether State Failed to Disclose Agreement with Witness in Violation of *Brady v. Maryland*. The petitioner was convicted of several felonies in connection with a shooting in New Haven. He brought this habeas petition, claiming that the state improperly withheld exculpatory evidence at his criminal trial in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). He claimed that the state failed to disclose an agreement with his codefendant, Markese Kelly, to reduce the charges and/or the sentence in Kelly's pending criminal matter in exchange for Kelly's testimony at the petitioner's criminal trial. The petitioner also asserted that Kelly's testimony regarding the nature of his agreement with the state was false in that he testified that he received no consideration from the state in exchange for his testimony. He further maintained that the state violated his due process rights by failing to correct Kelly's false testimony. The habeas court denied the habeas petition, finding

that Kelly's testimony was not false and that the nature of the agreement was properly disclosed to the petitioner and properly utilized at trial by the petitioner's trial counsel. In coming to this conclusion, the court emphasized that the prosecutor credibly testified that he properly disclosed to defense counsel that Kelly would testify against the petitioner, that Kelly had entered guilty pleas prior to the petitioner's trial, that there was no specific sentencing agreement, and that Kelly's cooperation would be made known to the sentencing judge after Kelly testified in the petitioner's trial. The court also determined that the petitioner's trial counsel accurately testified that he was made aware of the understanding between the state and Kelly before the criminal trial and that he used his knowledge of Kelly's motive to testify against the petitioner to effectively impeach his credibility before the jury. Finally, the habeas court found that Kelly's testimony was not false or misleading and that he sufficiently and accurately described his understanding with the state. The petitioner appeals, arguing that the habeas court improperly rejected his claims that the state violated his due process rights by failing to disclose its agreement with Kelly and by failing to correct Kelly's false testimony. He also maintains that the Supreme Court should overrule *Hines v. Commissioner of Correction*, 164 Conn. App. 712 (2016), to the extent that it stands for the proposition that the state is not obligated to correct a witness' false testimony when the state has informed defense counsel about an agreement with the witness.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

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